IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 2044 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE PRADIP KUMAR SARKAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MUNICIPAL CORPORATION OF THE CITY OF AHMEDABAD

Versus

STATE OF GUJARAT

Appearance:

MR SB VAKIL for Petitioner

MS NANDINI JOSHI, GOVT PLEADER for Respondent No.1

MR A.D.OZA , LD.COUNSEL FOR Respondent No. 2 & 3

MR KB PUJARA for Respondent No. 4

CORAM : MR.JUSTICE PRADIP KUMAR SARKAR

Date of decision: 16/04/2001

CAV JUDGEMENT

1. Heard Learned counsel for the parties. Rule . Learned Counsel Ms. Nandini Joshi, Mr A.D. Oza and Mr. K.B. Pujara waives service of rule on behalf of Respondents No. 1, 2 & 3 and No. 4 respectively.

2. The Ahmedabad Electricity Company Limited, Respondent No.4, submitted an application before the Gujarat Electricity Regulatory Commission on 18-12-2000 for re-fixation/revising the rate of tariff of electricity consumed by the consumers. After receipt of the application, the Commission published a Notification on 16-1-2001 inviting objections and suggestions from the public within thirty days from he date of publication of the notice. Many applications were filed by individuals or associations, but the petitioner Ahmedabad Municipal Corporation did not file any objections/suggestions in response to the notification issued by the Commission. However, the Commission extended the time till 28-2-2001 for filing objections and suggestions by the consumers. On 22-2-2001 the petitioner Ahmedabad Municipal Corporation filed an application to the Commission and prayed for: (a) adding the Corporation as party in the proceedings before the Commission, (b) to direct the Ahmedabad Municipal Corporation to affirm their affidavit in accordance with the provisions of Regulation in the form prescribed by the Commission, (c) to grant adequate time to enable the petitioner Corporation to file objections and suggestions. Said application of the petitioner dated 22-2-2001 is still pending. The petitioner Corporation filed another application to the Commission for supply of copies of the objections and suggestions filed by various parties before the Commission. The Commission by letter dated 7-3-2001 informed the petitioner Corporation that, there is no provision to supply copies to the otherside and therefore rejected the prayer of the petitioner Corporation. However, during pendency of this case, the Commission has supplied certified copies of the documents as required by the petitioner Corporation. Therefore it is admitted by learned counsel for the petitioner that the prayer at Para - 7 C. of the petition has become infructuous. Thereafter the petitioner Ahmedabad Municipal Corporation submitted Part-I of its objections before the Commission on 28-2-2001. The Commission by letter dated 12-3-2001 (Annexure-G) communicated the petitioner fixing 22-3-2001 as the date of hearing of the petitioner's objection at 2.30 p.m. The petitioner Corporation having felt aggrieved by the action of the Commission and also for not disposing of their application dated 22-1-2001 filed the present petition, mainly on the ground that there is a vacancy in the Commission and therefore the existing two members cannot take up hearing of the case or cannot decide any question raised by any party. Accordingly, the petitioner Corporation sought for a direction on the Government of Gujarat to appoint the Chairman of Gujarat

Electricity Regulatory Commission in accordance with provisions of Section 17 of The Electricity Regulatory Commissions Act, 1998. The petitioner further prayed for a direction from the Commission to decide its application dated 22-2-2001 in accordance with law.

3. On behalf of the Gujarat Electricity Regulatory Commission, counter affidavit has been filed, wherein they have denied the allegations made by the petitioner. It is stated in the counter affidavit that certified copies of the documents asked by the petitioner Corporation has already been supplied, and it is also stated that the application of the petitioner dated 22-2-2001 is under consideration of the Commission. It is also stated that the parties who are desirous of representing their case before the Commission have been afforded full opportunity of hearing. It is also submitted that the provisions of Section 9, 10, and 23 of the Electricity Regulatory Commissions Act, 1998 clearly empowers two members to decide any question raised before the Commission and a mere vacancy in the Commission will not invalidate the proceedings before the Commission. The Respondent No. 4 Ahmedabad Electricity Company filed their counter affidavit wherein they have denied the allegations made by the petitioner. It is stated that, in pursuance of the application for re-fixing the tariff the Commission has registered their case being Case No.: 34 of 2000 and the Commission is proceeding with the case in accordance with the provisions of the Electricity Regulatory Commissions Act, 1998. It is also stated that the petitioner with a view to delay re-fixation of the tariff has filed the present petition and also filed the amendment petition so that the Commission may not decide the application early. It is stated that in accordance with the provisions of the Gujarat Electricity Regulatory Commissions Act, State Government constituted a Commission with three members. However the Chairperson of the Commission Mr. Justice D.G. Karia attained the age of 65 years on 27-11-2000 and accordingly Mr. B.M. Oza, another member of the Commission has been appointed to hold the additional charge of Chairperson of the Commission until further orders. In the counter affidavit, it has been stated that the State Government is contemplating to enact the State Law for providing reorganisation and rationalisation of electricity industry in the State and also for establishing a State Electricity Regulatory Commission in the State for regulating electricity industry and for the matter connected therewith or incidental thereto. It is also stated in the counter affidavit that, a Bill, namely Gujarat Electricity Industry (Reorganisation &

Regulation) Act has been introduced in the State Assembly in February-March 2001 Assembly session. Since the Assembly was for a sort duration because of the earthquake on 26-1-2001 the bill is still pending in the Assembly, and the Government is contemplating to pass the bill during next sessions. It is also stated in the counter affidavit that the present two members of the Commission can proceed with the works of the Commission and mere vacancy of a member will not invalidate any decision of the Commission.

4. That, by filing of the present petition, the petitioner also prayed for an interim relief to stay further proceedings of Case No. 34 of 2000 pending before the Commission till final decision of the petition. However the ad-interim relief was partly granted and hearing of the objection of the petitioner which was fixed on 22-3-2001 by the commission and was communicated to the petitioner by the Commission by its letter dated 12-3-2001 has been stayed. This Court had granted ad-interim relief till 30-3-2001 for decision of the interim prayer. However the interim matter could not be heard because of filing of counter affidavit and amendment petition by the petitioner and therefore, the entire matter was heard on different dates, i.e. 9th, and 10th April 2001.

5. Mr. S.B. Vakil, Learned Senior Counsel appearing on behalf of the petitioner argued that the Commission was constituted by the Government with 3 members and after retirement of Mr. Justice D.G. Karia on 27-11-2000 the Government is under an obligation to appoint a Chairperson. It is submitted by Mr. Vakil that, according to the provisions of sub section (3) of section 18 of the Electricity Regulatory Commissions Act, 1998 the Government should have taken steps for appointment of Chairperson six months prior to the retirement of Mr. Justice D.G. Karia. Since the Government has not appointed any Chairperson, Mr. Vakil submitted that, Mr. B.M. Oza, the Member of the Commission have been asked to hold additional charge of the Commission after retirement of Mr. Justice D.G. Karia as Chairperson. Mr. Vakil further submitted that mere holding of charge of Chairperson will not make the Commission consisting of three members, and therefore, the present Commission with two members have no right to hear the application filed by Ahmedabad Electricity Company. Learned Senior Counsel also argued that sub section (1) of section 9 provides that the business in the meeting shall be transacted when a Quorum as provided under the Regulations is satisfied. Mr. Vakil draws my

attention to Regulation 21 of the Gujarat Electricity Regulatory Commission (Conduct Of Business) Regulations 1999. It appears that the quorum for the proceeding before the Commission shall be three. Accordingly Mr. Vakil submitted that any meeting without the quorum as prescribed in Regulation 21 will be invalid and illegal. Mr. vakil also argued that, at present the Gujarat Electricity Regulatory Commission has two members and one of the member is discharging duties of Chairperson but he is not a regular Chairperson of the Commission. Mr. Vakil referring the decision of the Apex Court reported in 1960 (1) GLR, page 260 submitted that, when there is absence of jurisdiction apparent on the face of the proceedings the Court in exercise of its discretion should grant relief by issuing writ, unless there is very strong case made out for withholding the same. Mr. Vakil accordingly submitted that the Government constituted the Commission with three members and after retirement of the Chairperson no one is appointed by the Government, and at present there are only two members in the Commission. Mr. Vakil accordingly submitted that unless three members are appointed, the Commission cannot hear any dispute, and hearing of applications and making decisions by two members will be without jurisdiction. Mr. Vakil accordingly submitted that since two members are now proceeding with the hearing of case No. 34 of 2000 arising out of an application filed by Ahmedabad Electricity Company, it is necessary to direct the Commission to stop further proceeding and direction is also required to be issued to the Government for appointing Chairperson of the Commission.

6. The arguments on behalf of the State of Gujarat as well as Ahmedabad Electricity Company is that, no act or proceeding of the State Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in constitution of the State Commission. Learned Government Counsel Mr. Oza and Mr. K.B. Pujara appearing on behalf of Ahmedabad Electricity Company draws my attention to provisions of Section 10 of the Electricity Regulatory Commissions Act, 1998. Learned Government counsel and Mr. Pujara have also drawn my attention to the provisions of sub section (2) of section 9 of the said Act. It is argued by learned counsel for the respondents that meeting of the Commission can be held by even with two members where there is no Chairperson in the Commission. Mr. Pujara learned counsel also drawn my attention to the provisions of Regulation 119 of the Electricity Regulatory Commissions (Conduct of Business) Regulations 1999. It appears from Regulation 119 that failure to comply with

any of the requirement of this regulations shall not invalidate any proceeding merely by reason of such failure unless the Commission is of the view that such failure has resulted in miscarriage of justice. Mr.Pujara accordingly submitted that since there are two members in the Commission and the Act authorises the two members to decide all questions, therefore, non compliance of provision 21 of the Regulations regarding quorum cannot invalidate the proceedings before the Commission. The only point that requires a decision in the present case is, whether the Gujarat Electricity Regulatory Commission can function with two members.

Sub section (4) of section 17 of the Electricity Regulatory Commissions Act 1998 provides inter alia that the State Commission shall consist of not more than three members, including the Chairperson. Section 9 read with section 23 of the aforesaid Act provides for proceeding before the State Commission. It appears, business shall be transacted with the required quorum as may be determined by the Regulations. Regulation 21 provides that the quorum of the meeting shall be three. However the proviso to Regulation 21 provides for lesser member for a quorum. It appears from the provisions of sub section (2) of section 9 of the Act that the meeting can be held even when there is no Chairperson in the Commission. From sub section (3) of section 9 it further appears that all questions which comes up before any meeting of the State Commission shall be decided by a majority of the members. Section 17 provides that State Commission shall not consist of more than three members. At present two members are functioning and one member Mr. B.M. Oza has been appointed to discharge the function of the Chairperson. Section 10 read with section 23 of the Electricity Regulatory Commissions Act,1998 further provides that any act or proceeding of the State Commission shall not be questioned or shall not be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the State Commission. From the Scheme of the Act it is clearly evident that the Electricity Regulatory Commissions Act, 1998 contemplates that the business of the Commission can be transacted by two members when there is a vacancy in the Commission. It is true that Regulation 21 provides that the quorum of a meeting shall be three, but I am of the view that the provision of the Regulation 21 is required to be harmoniously interpreted when the Act empowers the two members to hold a meeting, and I am of the view that the meeting with quorum of two members will be a sufficient compliance of the Act and the Regulations framed there under.

7. Mr. Vakil , Learned Senior Counsel for the petitioner insisted that the application filed by the petitioner before the Commission should be decided by this Court as the Commission functioning with two members has no power or jurisdiction to decide that application. It appears that the petitioner has filed an application on 22-2-2001. The application is filed with a prayer to make them party in the proceeding before the Commission and for directing the Ahmedabad Electricity Commission to file their affidavit in accordance with the provisions of the Regulations.

After going through various provisions of the Electricity Regulatory Commissions Act, 1998 and the Regulations framed thereunder, I have no hesitation to hold that two members are competent to decide the application filed by the Ahmedabad Electricity Company. Similarly the Commission is also competent to decide the application filed by the petitioner on 22-2-2001. It is also stated in the counter affidavit of the Commission that the Commission is considering the application of the petitioner dated 22-2-2001, but because of the stay order they are not in a position to decide the same. It further appears from the provision 27 of the aforesaid Act that any person aggrieved by any decision or order of the State Commission may file an appeal to the High Court. It is therefore evident that, there is existence of an alternative remedy which is very material circumstance to be taken into account when the Court is called upon to issue a writ. If the petitioner is aggrieved by any decision of the Commission they may approach the High Court for appropriate relief. On this ground also I am not inclined to decide said application of the petitioner. On the contrary I leave the matter to the wisdom of the Commission for decision. After going through various provisions of the Electricity Regulatory Commissions Act, 1998, and the rules & regulations framed thereunder I am clearly of the view that, the Commission can function with two members and this has the sanction of the Statute. Therefore, no direction can be issued at this stage on the State Government to appoint the Chairperson. And, I am also of the view that the Commission which is now functioning with two members cannot be directed to stop further proceedings.

8. Mr. Vakil, Learned Senior Counsel also argued that the proceedings before the Commission shall be deemed to be a judicial proceeding and therefore while

deciding judicial proceeding the Quorum prescribed under the law cannot be violated. Mr. Vakil also submitted that in Regulation No. 21 it has been provide that the quorum for meeting of the Commission shall be three, and therefore since the Chairperson has retired and only two members are now functioning, the Commission having two members cannot decide the present proceeding. I do not agree with the submission of Mr. Vakil. I have already discussed that section 9, 10 read with section 23 of the Act empowers the Commission to transact its business or to hold its meeting even if there is a vacancy in the Commission. Consequently the number of quorum is to be decided in consonance with the number of members functioning in the Commission. The Regulations made under the provisions of Act cannot over ride the provisions of the Act. Therefore, I am of the view that the Commission with two members at present is competent to decide a question and transact the business of the Commission in accordance with provisions of the said Act. Consequently I do not find any force in the argument of Mr. S.B. Vakil, Learned Senior Counsel appearing on behalf of the petitioner and accordingly the petition is dismissed.Interim stay granted by order of this Court dated 21-3-2001 is vacated.

9. It appears that, it is an admitted fact that the Commission has heard all persons and bodies who have filed objections and suggestions. The petitioner could not be heard because of the stay order granted by this Court on 21-3-2001. It is submitted by Mr. Pujara, Learned counsel appearing on behalf of the Ahmedabad Electricity Company that the Company has made an application for revising the tariff after a long time and if the Commission is not permitted to function, then the Company will suffer huge loss. Mr. Vakil, Learned Senior Counsel submitted that sufficient time should be given to the Petitioner Corporation to enable them ti file second part of their reply. It appears that petitioenr's hearing could not be taken by the Commission on 22-3-2001 because of the interim stay order and in the meantime considerable time has also passed and the Commission has not been able to proceed with the case. Accordingly, I am of the view that the Commission should give reasonable time to the petitioner which shall not be lessthan seven days to file their objections and suggestions and thereafter, after hearing the petitioner Corporation, the Commission may take their decision on the application of the Ahmedabad Electricity Company in accordance with law. The Commission is also directed to decide the application of the petitioner dated 22-2-2001 in accordance with law.

9. The petition is accordingly dismissed, but with the aforesaid directions. Rule discharged. Interim relief granted earlier stands vacated. However, I make no order as to costs.

Date: 16-4-2001 (P.K. Sarkar, J)

Further Order:

Mr. S.B. Vakil, Learned Senior Counsel appearing on behalf of the petitioner submits that the judgment & order passed today be stayed for ten days, so as to enable him to file an appeal before the Division Bench. Alternatively, Learned Counsel submits that the interim relief granted earlier in this case be extended for another ten days. I am not inclined to stay the proceedings of the Commission in view of the fact that, the delay will affect the finance of the State. Further, sufficient time has already been given by way of interim order to the petitioner. Consequently, the prayer of the Learned Senior Counsel for staying the judgment & order, or for extending the interim relief is hereby rejected.

Dt: 16-4-2001 (P.K. Sarkar, J)

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